NO.

in the Supreme Court of the United States

LARRY W. BURDGICK,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE FOURTH DISTRICT COURT OF APPEALS FOR FLORIDA

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18 pp

QUESTIONS PRESENTED

Whether evidence that resulted from an illegal arrest of the Petitioner was improperly admitted at trial.

Whether Florida Statute 856.021 is unconstitutionally vague in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

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PETITION FOR WRIT OF CERTIORARI TO THE FOURTH DISTRICT COURT OF APPEAL FOR FLORIDA

Petitioner prays that a Writ of Certiorari be issued to review the judgment of the Fourth District Court of Appeal for Florida entered in the above-styled case on March 21, 1984, rehearing denied April 13, 1984.

OPINION BELOW

The opinion of the Fourth District Court of Appeal for Florida is not reported and is printed in the appendix.

JURISDICTION

The judgment of the Fourth District Court of Appeal for Florida was entered on March 21, 1984, rehearing denied April 13, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1257.

STATEMENT OF THE CASE

The Petitioner, Larry W. Burdgick, and others, were charged by information with trafficking in Methaqualone. The trial court denied defendants' Motion to Suppress Evidence. Upon specifically reserving the right of appellate review on said issue, the Petitioner, Larry W. Burdgick, pled nolo contendere to attempted trafficking in excess of 25 kilograms of Methaqualone and was sentenced to a term of ten years. Said conviction and sentence was affirmed by the Fourth District Court of Appeal of Florida on March 21, 1984, rehearing denied April 13, 1984. This Petition for Writ of Certiorari in the United States Supreme Court follows.

STATEMENT OF THE FACTS

At the hearing on the Motion to Suppress, Henry Devlin of the Port St. Lucie Police Department testified that on January 7, 1981 at 9:15 p.m., while off duty, he and his father observed a van and another vehicle parked by the side of the road in an unoccupied section of Port St. Lucie. Devlin testified that area police had

previously received information regarding the possible slaughtering of cattle taking place in the general vicinity, but that there were no cows in the area of the observed vehicles. In fact, Devlin admitted that there were no homes or residents in the area, and that he did not observe the suspects violating any laws.

Charles Sutton of the Port St. Lucie Police Department testified that Devlin contacted him and told him that there was suspicious activity, even though there were no houses, apartments or parks in this uninhabited area. Sutton approached the suspects, identified himself, and demanded the suspects to converge in the center of the road. Co-defendants John Manter and Charles Longwell appeared to ignore this request until Longwell first walked over to the weeded area by the side of the road.

All the suspects were frisked for weapons; none were found. Officer Sutton proceeded to the weeded area and found ground aircraft trans-receiver with an antenna and microphone. He also found inside a bag a .25 caliber gun and five strobe lights. A search of the van revealed a plastic container, a clear plastic hose, another trans-receiver, and walkie-talkie type radios. The defendants were arrested at this time upon a charge of loitering and prowling.

At 10:40 p.m. Officer Sutton heard an aircraft flying South. Within minutes, the aircraft was heard again. Using the trans-receiver to contact the plane, Officer Sutton, in an undercover capacity, directed the plane to land. A subsequent search revealed Methaqualone on board.

ARGUMENT

ISSUE I

EVIDENCE THAT RESULTED FROM AN ILLEGAL ARREST OF THE PETITIONER WAS IMPROPERLY ADMITTED AT TRIAL.

An hour and fourteen minutes had elapsed between the time the defendants were originally observed and ultimately arrested. Officer Sutton had the defendants detained on the ground for an additional hour before the aircraft landed at the direction of law enforcement officials. Although no crime had been committed in the officers' presence, the officers had their guns drawn and had placed the defendants lying in the street before any questions were asked of them.

After placing all the defendants on the ground, officers read them their *Miranda* rights. When subsequently asked what they were doing, the defendants did not answer, merely producing their drivers' licenses and identification. The defendants were then arrested for loitering and prowling in the rural area in violation of Florida Statute 856.021. The area in which the defendants were arrested was uninhabited, without buildings or livestock.

The Supreme Court of Florida, in *State v. Ecker*, 311 So.2d 104 (Fla. 1975) concluded that police officers do not have unbridled discretion to arrest whenever they please under the color of Florida Statute 856.021. The loitering and prowling statute is not designed to be used as a "catch all" provision so that citizens may be detained, when there is an insufficient basis to sustain

a conviction on some other charge. *B.A.A. v. State*, 356 So.2d 304 (Fla. 1978).

Florida Statute 856.021 requires that the following elements of a crime be present:

> 1. That the defendant loiter or prowl in a place, at a time, or in a manner not usual for law-abiding individuals.
>
> 2. Such loitering and prowling were under circumstances that warrant justifiable and reasonable alarm or immediate concern for the safety of persons or property in the vicinity.

Under the facts of the present case, there was no testimony that the defendants were near buildings, on private property, or near any persons in the vicinity. Furthermore, although one stated reason for the police officers' actions was their suspicion of criminal activity, such as the theft of livestock, the officers acknowledged that there was, in fact, no livestock in the vicinity.

The Florida Supreme Court in *State v. Ecker*, *supra*, held that an arrest pursuant to Florida Statute 856.021 must be justified upon specific and articulable facts upon which a finding can be made that a breach of the peace is imminent or that the public safety is threatened. The testimony at the suppression hearing is clear that none of the defendants fled and that they presented credible and reliable identification. Furthermore, from the initial observation to the time the defendants were placed under arrest, the officers observed nothing which would constitute an illegal act.

In the present case, the facts clearly demonstrate that the defendants were placed under arrest without the requisite probable cause. It is well settled that suspects can be in *de facto* custody, even though not formally arrested. *Dunaway v. New York*, 422 U.S. 200 (1979).

The defendants herein were held for over two hours, having been placed face down in the street under the drawn guns of the police. It is permissible to detain suspects only for a "reasonable time" to investigate the circumstances warranting the investigatory stop. The time that the defendants were detained could not be considered "reasonable" under this set of circumstances.

If there were not sufficient grounds to find probable cause upon which to detain or arrest the defendants for loitering and prowling, the defendants were thus arrested solely as a "means employed by the police to discover evidence to further connect" the defendants with an offense. *Mills v. Wainwright*, 415 F.2d 787 (5th Cir. 1969).

In *Mills*, the Fifth Circuit Court of Appeals reversed the defendant's conviction in the Florida State Courts based upon the conclusion that the defendant's arrest for vagrancy was illegal and unrelated to any offense upon which there was probable cause to take the defendant into custody.

> In fact, it was while Mills was being detained on the vagrancy offense that fingerprints were taken that connected him with the crime of

which he was later convicted. There is no question that the vagrancy arrest was a sham.

Thus, the Petitioner's initial arrest for loitering and prowling was a mere sham, an investigatory tactic used to further connect him to other suspected crimes not yet based upon either articulable suspicion or probable cause. Under the dictate of *Mills*, the evidence emanating from this illegal detention must be suppressed.

In addition to the suppression of physical evidence, the previously unknown identity of the Petitioner would also be suppressible. The Court in *United States v. Chamberlain*, 609 F.2d 1318 (9th Cir. 1979), recognized that the identification of the defendant could be a fruit of police illegal activity and thus subject to the exclusionary rule. By analogy, fingerprints, like the Petitioner's identification, would be suppressed if taken from the defendant during the course of an illegal stop and detention.

Since law enforcement authorities lacked probable cause upon which to arrest the Petitioner for loitering and prowling, and lacked probable cause upon which to base any other arrest, the evidence obtained as a result of Petitioner's illegal arrest, including his identity, should have been suppressed.

ISSUE II

FLORIDA STATUTE 856.021 IS UNCONSTITUTIONALLY VAGUE IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The Petitioner was arrested pursuant to Florida Statute 856.021. However, the recent decision of this Court in *Kolender v. Lawson*, ____ U.S. ____, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983) would render Florida Statute 856.021 unconstitutionally vague on its face. The California statute considered in *Kolender* contained no standard for determining what a "credible and reliable" identification was as required to be provided by the suspect when approached by law enforcement officers under California Penal Code §647(e) and *People v. Solomon*, 33 Cal. App. 3rd 429 (1973).

Similarly, the Florida Supreme Court in *State v. Ecker, supra*, has construed Florida Statute 856.021 to require a suspect to produce "credible and reliable" identification when confronted by a law enforcement officer, as well as "a reasonable explanation" with which to alleviate the law enforcemcnt officer's concern for the public safety.

This Court held in *Kolender* that the standard of "credible and reliable" identification was unconstitutionally vague since, it "encourages arbitrary enforcement by failing to describe with sufficient particularity what a suspect must do in order to satisfy the statute". Thus, without a set and articulated standard, "the statute rests virtually complete discretion in the hands of the

police to determine whether the suspect has satisfied the statute. . . ."

The Petitioner would respectfully submit that Florida Statute 856.021, like California Penal Code §647(e), is unconstitutionally vague inasmuch as it gives the police no governing standard for determining whether the suspect has satisfied the statute. Nowhere in the Florida Statute or case law is there any articulable guidance on what grounds the officers should use in determining whether the suspect's "explanation" is "believable" or not, or whether the identification presented to the officers is "reliable" or "credible".

If this Court finds that the arrest of the Petitioner was made pursuant to an illegal and unconstitutional statute, then all evidence flowing from said illegal detention should have been suppressed.

CONCLUSION

For the above reasons and authorities cited herein, it is respectfully requested that this Honorable Court grant its Writ of Certiorari and enter its order quashing the decision hereby sought to be reviewed, and grant such other and further relief as seems right and appropriate to this court.

Respectfully submitted,

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Appendix

IN THE DISTRICT COURT OF APPEAL OF THE
STATE OF FLORIDA FOURTH DISTRICT

CASE NO. 83-573, 83-653,
83-654, 83-859.

CHARLES A. LONGWELL, et al.,

Appellant,

v.

STATE OF FLORIDA

Appellee.

April 13, 1984

BY ORDER OF THE COURT:

ORDERED that Appellants' March 28, 1984 Motion for Rehearing is denied.

I hereby certify the foregoing is a
true copy of the original court order.

CLYDE L. HEATH,
CLERK

cc: Ronald A. Dion, Esq.
James P. McLane, Assistant Attorney General

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA FOURTH DISTRICT

JANUARY TERM 1984

CASE NOS. 83-573, 83-653,
83-654, 83-859.

CHARLES A. LONGWELL,
LARRY WAYNE BURDGICK,
PAUL EDWARD FREIDLING,
JOHN COLE MANTER,

Appellants,

v.

STATE OF FLORIDA,

Appellee.

Decision filed March 21, 1984

Consolidated appeals from the
Circuit Court for St. Lucie
County: Royce R. Lewis, Judge.

Spencer D. Levine of Entin,
Schwartz, Dion & Sclafani,
North Miami Beach, for appellants.

Jim Smith, Attorney General,
Tallahassee, and James P. McLane,
Assistant Attorney General, West
Palm Beach, for appellee.

PER CURIAM.

AFFIRMED.

ANSTEAD, C.J., LETTS and GLICKSTEIN, JJ., concur.